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AT&T CORP. and AT&T INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIK KNUTZEN on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

vs.

AT&T CORP., AT&T INC. and DOES 1-20, inclusive,

Defendants.

No. C-06-0672-VRW

DECLARATION OF BRUCE A. ERICSON IN SUPPORT OF MOTION OF DEFENDANT AT&T CORP. TO COMPEL RETURN OF CONFIDENTIAL DOCUMENTS

Date: To be set by the Court
Time: To be set by the Court
Courtroom: 6, 17th Floor
Judge: Hon. Vaughn R. Walker

Filed concurrently:
1. Motion and Memo
2. Declaration of James W. Russell
3. Proposed Order
4. Administrative Motion

Dockets.Justia.com

I, **BRUCE A. ERICSON**, declare as follows:

1. I am an attorney licensed to practice law in the State of California and admitted to practice before this Court, and am a partner of the law firm of Pillsbury Winthrop Shaw Pittman LLP, counsel for movant/defendant **AT&T CORP.** ("AT&T") and also for specially appearing defendant **AT&T INC.**, which is not a party to this motion (AT&T and AT&T Inc. are collectively referred to as the "defendants"). I have personal knowledge of the facts stated herein and, if called as a witness, I could and would competently testify thereto.

2. On Thursday, March 30, 2006, I, along with my colleague, David L. Anderson, received a telephone call from plaintiffs' counsel Lee Tien of the Electronic Frontier Foundation. Mr. Tien told us that plaintiffs were planning to file a motion for preliminary injunction that day and he solicited defendants' stipulation as to the handling of what he described as certain "AT&T proprietary" documents in plaintiffs' possession.

3. Not having any idea what Mr. Tien was talking about, we asked Mr. Tien what he meant by "AT&T proprietary" documents. He said that plaintiffs had obtained from a former AT&T employee three documents, totaling something under 100 pages and marked "AT&T Proprietary." He said they pertained to AT&T facilities and he mentioned some sort of facility at a particular location. Until Mr. Tien's call, I had been unaware that plaintiffs possessed AT&T documents of this sort.

4. Mr. Tien described the documents as highly technical in nature and said that plaintiffs had employed the assistance of an unidentified expert to assist them in analyzing and understanding the documents.

5. Mr. Tien explained that plaintiffs intended to base their motion for preliminary injunction in part on a declaration from the former AT&T employee himself or herself and on the three "AT&T proprietary" documents that the former employee had provided to plaintiffs. Mr. Tien did not explain the relevance of these documents or make any proffer as to why these documents were necessary or relevant to plaintiffs' allegations.

6. Because the documents were marked "AT&T Proprietary," Mr. Tien said he thought that AT&T would assert that the documents were confidential. He therefore was calling to request a stipulation that plaintiffs could file the documents under seal pursuant to Civil Local Rule 79-5(d). He conceded that Rule 79-5(d) does not exactly fit this situation because there is no protective order in place and because the documents had not been produced by defendants or deemed "confidential" by defendants, but he suggested that this procedure nevertheless would cover the situation. He said we would see the documents when they were filed via this procedure.

7. We asked Mr. Tien how he happened to come into possession of these "AT&T proprietary" documents. Mr. Tien said that all this would be explained in the former employee's forthcoming declaration. He added that the documents had been provided to plaintiffs' counsel "confidentially" by a "retired" AT&T employee who had obtained the documents during the course of his employment with AT&T. He said that the former employee had come to plaintiffs' counsel and had retained his own counsel. He said the former employee's name would appear in the moving papers in support of plaintiffs' preliminary injunction motion.

8. We asked Mr. Tien how long he had been in possession of the "AT&T proprietary" documents. He answered, "a couple of months."

9. Mr. Tien said that in his view and the view of his expert the "AT&T proprietary" documents would provide evidence of involvement in the matters alleged in plaintiffs' complaint. He also said that he understood that defense counsel might need to discuss this matter with the United States Department of Justice ("DOJ").

10. Mr. Anderson and I said that in light of Mr. Tien's statements, we thought we would wish to discuss this matter with the DOJ to see whether the documents were something that we as defense counsel should even review. We added that we were not sure that the procedures of Rule 79-5 would suffice if indeed it turned out that Mr. Tien's view

of the documents was correct. In any event, we said, that would be a judgment for DOJ to make, not private defense counsel.

11. We then proceeded to talk to Mr. Tien about ancillary matters, such as hearing dates, page limits and discovery. Mr. Tien reiterated that he wanted to file his preliminary injunction motion that day and therefore wanted to hear back from us by 2 p.m. We asked him to postpone his filing temporarily, explaining that we were not sure we could resolve things by 2 p.m. We offered to stipulate to his preferred hearing date so that plaintiffs would not lose that date if they held off filing their motion for a few days.

12. After speaking with Mr. Tien, Mr. Anderson and I, along with our co-counsel at Sidley Austin LLP, contacted attorneys with the DOJ in Washington, D.C. We did so to apprise the DOJ of the situation and to give the DOJ an opportunity to review the documents and decide whether they were "classified" or otherwise not suited for treatment under Rule 79-5. The DOJ lawyers indicated that they wished to review the documents. I understand that thereafter plaintiffs' counsel arranged to deliver a set of the documents to the DOJ in Washington, D.C.

13. Just before 5 p.m. on March 30, 2006, Ms. Cohn sent us a proposed stipulation, a true and correct copy of which is attached hereto as Exhibit A.

14. We had some problems with plaintiffs' draft stipulation. After discussions, I emailed Mr. Tien with my proposed re-draft of a stipulation on Friday, March 31, 2006, around 1:57 p.m. A true and correct copy of my draft stipulation is attached hereto as Exhibit B. As discussed further below, plaintiffs did not respond regarding the draft stipulation until Wednesday, April 5, 2006, when they rejected it.

15. Shortly before I emailed our counterproposal, plaintiffs began e-filing their preliminary injunction papers. Between approximately 1:49 p.m. and 4:25 p.m. that afternoon, they filed what became docket entries 17 through 22.

16. That day, plaintiffs' counsel posted a press release titled "EFF Motion in AT&T Surveillance Case Draws Government's Eye" on their website. A true and correct

copy of the press release is attached hereto as Exhibit C. I am informed and believe that plaintiffs' counsel have also spoken with the media on these subjects. A true and correct copy of a March 31, 2006 article entitled "Sensitive documents surface in AT&T-NSA spy lawsuit" that appeared on C-Net News.com is attached hereto as Exhibit D.

17. On Tuesday, April 4, 2006, at around 1:04 p.m. I received via email a letter from the DOJ addressed to Ms. Cohn and Mr. Tien. A true and correct copy of the letter is attached hereto as Exhibit E.

18. On April 4, 2006, at around 2:26 p.m. I emailed and later faxed to plaintiffs' counsel a letter regarding the confidentiality of the "AT&T proprietary" documents. In my letter, I confirmed that documents were confidential and proprietary AT&T documents and asked plaintiffs to return them to AT&T and to refrain from filing them without leave of Court.

19. On April 5, 2006, at around 11:49 a.m. I received via email a letter from Ms. Cohn. A true and correct copy of Ms. Cohn's letter is attached hereto as Exhibit F. Ms. Cohn noted that events had "overtaken most of the draft stipulation" that I had circulated on March 31. She also rejected my request to return the documents to AT&T and to refrain from filing them.

20. On April 5, 2006, between approximately 4:43 pm and 5:37 pm plaintiffs' counsel e-filed and e-served docket entries 28 through 36. Docket entry 35 attached as Exhibit B thereto my letter to plaintiffs' counsel (see paragraph 22 above) explaining why the "AT&T proprietary" documents should not be made public. My letter thus has now been made public. On April 7, 2006, a reporter from the *San Francisco Chronicle* called to question me about the letter; I declined to speak to him.

21. Also late on the afternoon of April 5, 2006, I was hand-served with several manually filed documents, including the declarations of Mark Klein and J. Scott Marcus. The declaration of Mr. Klein attaches the "AT&T proprietary" documents as Exhibits A through C thereto. Both declarations make extensive references to the documents.

22. On April 6, 2006, plaintiffs' counsel released a press release describing their filing under seal of the Klein and Marcus declarations. A true and correct copy of that press release is attached hereto as Exhibit G.

23. On April 6, 2006, this press release was discussed in an article on a blog operated by C|Net. A true and correct copy of that article is attached hereto as Exhibit H.

24. On April 7, 2006, *The New York Times* ran an article on Mr. Klein's declaration stating that Mr. Klein had provided some of his documents to *The New York Times*. A true and correct copy of that article is attached hereto as Exhibit I.

25. On April 7, 2006, a website called Wired News (www.wired.com) ran an article entitled "Ex-AT&T Worker Tells of NSA Op," which purports to be a verbatim written statement given by Mr. Klein to news organizations. A true and correct copy of Mr. Klein's purported statement, which covers in summary fashion the allegations set forth in the declaration he filed under seal, is attached hereto as Exhibit J. I am informed and believe that this statement includes purported facts that would be of particular interest and use to would-be hackers.

26. On April 8, 2006, the *San Francisco Chronicle* ran an article entitled "Court filings may reveal role of AT&T in federal Net spying," which references Mr. Klein and quotes a spokesperson for EFF who comments on "Klein's documents." A true and correct copy of the article is attached hereto as Exhibit K.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed this 10th day of April, 2006, at San Francisco, California.

/s/ Bruce A. Ericson
Bruce A. Ericson